

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ROGER EASTER**

Claimant

VS.

**STORMONT VAIL HEALTHCARE, INC.**

Self-Insured Respondent

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Docket No. 1,055,642

**ORDER**

Claimant requested review of the September 6, 2012, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on January 16, 2013.

**APPEARANCES**

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. John A. Bausch, of Topeka, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.<sup>1</sup> At the oral argument to the Board, the parties stipulated that December 15, 2010 is the appropriate date of accident in this matter.

**ISSUES**

The Administrative Law Judge found claimant did not sustain any additional permanent impairment and denied additional compensation.

The claimant requests review of the nature and extent of his disability. Claimant contends that his functional impairment after his prior work-related accident was never fully established in the record, therefore the ALJ's determination that he did not sustain any

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<sup>1</sup> Please note that the deposition of Dr. Zimmerman should be identified in the record as the Evidentiary Deposition of Daniel Zimmerman, M.D., not David Zimmerman, M.D.

additional permanent impairment as a result of his work-related accident while working for respondent must be reversed and claimant awarded a 22 percent whole person impairment as a result of his work-related accident.

Respondent argues the Award should be affirmed.

### **FINDINGS OF FACT**

Claimant began working for respondent on April 1, 2009, as a pharmacy technician. This job requires that claimant stock areas in the hospital with IV bags, boxes and fluids. Claimant testified that there is heavy lifting involved in his job for respondent and requires lifting boxes of pills, IV bags, IV boxes, and fluids. He also does a lot of walking. Claimant alleges his repetitive work for respondent caused him to develop neck, bilateral shoulder and arm pain.

Before working for respondent, claimant worked for Walmart as a pharmacy technician. Claimant began working for Walmart on December 27, 2006. Claimant stopped working for Walmart in September 2009, but continued to work for respondent, Stormont Vail after that date.

While claimant was working for Walmart he had an accident on September 20, 2008, resulting in injuries to his neck and lower trapezius area with some pain into his shoulders and arms. He filed and settled a workers compensation claim against Walmart. He was provided treatment with Donald T. Mead, M.D., of St. Francis Hospital and Medical Center and Zhengyu Hu, M.D. of the Pain and Wellness Clinic, Inc.

Claimant testified that when Walmart sent him to Dr. Mead, his neck was examined, x-rays were taken and physical therapy was ordered. The therapy included heat and ultrasound of the neck and lower and upper trapezius. He had no treatment for his arms. Dr. Mead called it deferred pain. Claimant was put on limited duty. At his second visit with Dr. Mead claimant was released to regular duty.

Claimant's treatment with Dr. Hu included cortisone injections in the neck which improved his pain for a time. Those injections reduced claimant's pain level to a 2 or 3 out of 10. Claimant met with Dr. Hu on two occasions March 10, 2009, and April 27, 2010. Claimant testified that his pain was manageable when he was treating with Dr. Hu.

Part of claimant's problem with his work at Walmart was that he had to work at a counter that was below his waist, causing him to have to bend over because he is so tall. The counters at Stormont are at a comfortable height for claimant and he doesn't bend as much. Claimant testified he spent 80 percent of his time at Walmart in a bent over position and at Stormont he spends 15 percent of his time in a position with his head or neck bent over. However, the job with respondent is more physical than the one he had with Walmart.

Claimant alleges he has pain in his lower back, that came on gradually while he was working for respondent.<sup>2</sup> Respondent does not agree to any work-related injury to claimant's low back. Claimant believes that the low back pain is from constantly bending over and stooping to pick up boxes weighing anywhere from 25 to 38 pounds.

When claimant reported his neck, shoulder and arm injuries to respondent, he was sent to Dale Garrett, M.D., for an evaluation. Claimant testified that by the time he met with Dr. Garrett for his neck, arms and shoulders he was already having problems with his low back. Dr. Garrett determined all of claimant's symptomatology was secondary to the prior injury at Walmart.<sup>3</sup> Claimant thought it obvious that his injury from his time at Walmart had not resolved and had gotten worse.<sup>4</sup> Claimant testified that his pain level was a 6 out of 10, an increase from the 2 out of 10 he had while being treated by Dr. Hu.

Claimant testified that he has limited range of motion in his neck from the left to right. He also gets fatigued in his back more often. He testified that his back pain is not as severe as his neck pain. Claimant feels a lot weaker in his arms, neck, and back. He is worse now than he was when he worked at Walmart because the pain he has now is a spiking pain that makes him cry and he drops things if it gets too bad.<sup>5</sup>

Claimant filed a claim against Stormont on November 23, 2009, because his neck had locked up on him and the pain would not go away. Claimant reported the lifting required with the job was causing him pain. His job also requires him to push a cart on carpet and linoleum floors that are not always level. Claimant testified that his workload has gone down, but he still has to push a cart throughout the day. Claimant also testified that, because of the renovation at Stormont, he has more supplies to lift and cart around. Each floor has an Omni station where the nurses can obtain supplies.

Claimant testified that when he was sent to Dr. Curtis he reported that some of his problems are related to his injury sustained while working at Walmart. An MRI and x-rays had been recommended, but Walmart would not authorize the tests.

Claimant testified that after he reported his injury to Stormont on November 23, 2010, it wasn't until April 15, 2011, that he was sent to Dr. Gilbert [sic]<sup>6</sup>. During that period

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<sup>2</sup> R.H. Trans. at 13.

<sup>3</sup> Bieri Depo. Ex. 2 at 6.

<sup>4</sup> R.H. Trans. at 15.

<sup>5</sup> *Id.* at 22.

<sup>6</sup> *Id.* at 49. Claimant likely meant Dr. Garrett.

of time, claimant continued to perform his regular job duties. Claimant was never taken completely off work for either the Walmart or Stormont injuries.

Claimant was referred by his attorney to board certified independent medical examiner Daniel D. Zimmerman, M.D., on June 24, 2011, for an examination. Claimant's chief complaints involved pain and discomfort affecting the cervical and thoracic spines. Claimant reported constant pain affecting the left trapezial musculature; numbness affecting the left lateral upper arm; cramping pain affecting the right and left cervical spine and thoracic paraspinous musculature; cramping pain affecting the trapezial musculature bilaterally; shooting pain radiating up the back of the neck toward the base of the skull and a feeling of stiffness affecting the cervical spine. Claimant complained of difficulty sleeping due to the pain and discomfort. Dr. Zimmerman testified that claimant stated the pain in his neck, trapezius and mid back areas was a continuation from his original injury at Walmart.<sup>7</sup>

Dr. Zimmerman examined claimant and found intraspinous tenderness from C2 through C7 and tenderness to palpation over the cervical paraspinous musculature bilaterally. Claimant also had pain on palpation over the right greater occipital nerve, decreased sensitivity to pin prick medially and laterally from the axillae to the right wrist and 3 inches above and 2 inches below the elbow. On the left side laterally, claimant had pressure from the axilla to the elbow. He reported decreased sensitivity to pin prick on the right and left sides from the axilla to the elbow level. On the lateral surface of the right distal forearm, claimant felt a weird sensation over approximately two inches of the skin surface. Claimant also reported decreased sensitivity to pin prick on the palmar surface affecting the 2nd, 3rd, and 4th digits on the right hand. Dr. Zimmerman opined this was likely due to claimant's previous injuries affecting the digits. Claimant had equal sensory perception to pin prick affecting all digits of the palmar surface on the left hand.<sup>8</sup>

Dr. Zimmerman opined claimant demonstrated a functional range of motion, muscle strength, bulk and function bilaterally at the shoulder, elbow, wrist, finger and thumb levels. He found atrophy in the digits on the right hand. At the thoracic level claimant had intraspinous tenderness from T2 through T10; tenderness in palpation over the thoracic paraspinous musculature bilaterally and marked pain in palpation over the right and left supraspinatus nerves. Claimant had equal sensory perception to pin prick comparing the right to the left side of the supraspinatus nerves and over the thoracic paraspinous musculature.<sup>9</sup>

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<sup>7</sup> Zimmerman Depo. at 19.

<sup>8</sup> *Id.*, Ex. 2 at 4-5 (Dr. Zimmerman's June 24, 2011, IME Report).

<sup>9</sup> *Id.*, Ex. 2 at 5 (Dr. Zimmerman's June 24, 2011, IME Report).

Dr. Zimmerman diagnosed claimant with a permanent aggravation of cervical osteoarthritis at C6, causally related to repetitive trauma affecting the cervical spine beginning when employed by Walmart and subsequently at Stormont Vail. He found claimant had sustained a 15 percent permanent partial impairment to the body as a whole. He also diagnosed chronic thoracic paraspinous myofascitis also causally related to repetitive work duties for Walmart and Stormont Vail, for which he assessed claimant a 7 percent permanent partial impairment to the body as a whole. Combined, those whole body impairments equal a 22 percent permanent partial whole body impairment. Dr. Zimmerman was unable to determine if claimant had any preexisting impairment.

Dr. Zimmerman's basis for finding claimant had a permanent aggravation of his spine from his work at Stormont Vail was the history that claimant had an arthritic condition and that it was now worse, based on claimant's prior records. He did not compare claimant's prior x-rays with his current x-rays. He acknowledged that Dr. Franklin, from Stormont-Vail Hospital, compared cervical x-rays from 2008, while claimant was working for Walmart with x-rays taken on April 15, 2010, while claimant was working for respondent. Dr. Franklin found the 2010 x-rays to be consistent with the earlier x-rays. The October 27, 2010, thoracic spine x-rays were read as normal.

Dr. Zimmerman opined that claimant was stable and at maximum medical improvement. He did not believe claimant was in need of further diagnostic or therapeutic intervention. He recommended claimant continue taking Ibuprofen for pain and discomfort and treat with heat in the form of hot tub baths, hot showers and/or a heating pad locally applied.

At the request of respondent, claimant met with board certified disability evaluating physician, Peter V. Bieri, M.D., for an examination on July 16, 2012. Claimant had complaints of constant pain in his neck radiating more into the left shoulder than the right; intermittent numbness and tingling in both upper extremities; pain radiating into the superior thoracic spine region; and pain at night requiring postural adjustment. Claimant admitted to a prior injury and that this recent injury caused an increase in the intensity and duration of his pain. Claimant reported being frustrated by the continuation of his symptomatology and his inability to obtain any relief. Dr. Bieri did not note complaints of low back pain. He indicated he would have examined claimant's back if he had.<sup>10</sup>

Examination of the cervicothoracic and thoracic spines revealed no visible or palpable muscle spasm, with only slight tenderness to palpation at the cervicothoracic junction with slight inconsistent loss of active range of motion. No atrophy was noted during the bilateral shoulder exam and range of motion was full and unrestricted.

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<sup>10</sup> Bieri Depo. at 21-22.

Dr. Bieri testified that claimant's December 15, 2010, injury resulted in an exacerbation of preexisting symptomatology, secondary to permanent impairment from an injury to the same area as reported in September 2008. Radiographic findings were unchanged from claimant's previous evaluations. He could not state within reasonable medical probability that claimant sustained any true additional impairment to the cervicothoracic spine attributable to injury reported on or about December 15, 2010.

Dr. Bieri noted that claimant had never really healed from his "significant"<sup>11</sup> injury at Walmart, when he began working at Stormont. Based on the documentation and to the best of his understanding, claimant had a 10-15 percent whole person impairment from his injury at Walmart. Dr. Bieri found claimant to be at maximum medical improvement and to have a significant permanent impairment to the same area as the previous injury. He testified claimant failed to meet the criteria for additional increased impairment from this later injury, based on pain alone.<sup>12</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>13</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>14</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>15</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, *et seq.*,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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<sup>11</sup> *Id.*, Ex. 2 at 5.

<sup>12</sup> *Id.*, Resp. Ex. 2 at 6 (Dr. Bieri's July 16, 2012, IME Report).

<sup>13</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>14</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>15</sup> K.S.A. 44-501(a).

occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>16</sup>

Claimant's testimony that he suffered an increase in pain on or about December 15, 2010, while moving boxes and pushing a cart is uncontradicted in this record. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>17</sup>

The Board finds claimant suffered accidental injury which arose out of and in the course of his employment with respondent on December 15, 2010. However, it remains claimant's burden to prove the extent of that new injury. Here claimant contends his prior injuries were substantially aggravated by his employment with respondent. Dr. Zimmerman agrees, but is unable to quantify what, if any, prior impairment claimant suffered while working at Walmart. Dr. Bieri, on the other hand, found the injuries suffered at Walmart to be the ongoing cause of claimant's current pain complaints, with no new impairment from his injuries with respondent. The ALJ agreed with the assessment by Dr. Bieri, and the Board concurs, and adopts the findings of the ALJ insofar as they are not inconsistent with the findings and conclusions contained herein.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered personal injury by accident on December 15, 2010, while working for respondent. However, claimant suffered no additional permanent injury or impairment from that accident.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated September 6, 2012, is affirmed.

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<sup>16</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>17</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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